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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16, 32, and 52

[FAC 2005-60; FAR Case 2011-003; Item II;

Docket 2011-0003, Sequence 1]

RIN 9000-AM01

Federal Acquisition Regulation; Payments Under Time-and-Materials and Labor-Hour Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to make necessary revisions to accommodate the authorization to use time-and-materials and labor-hour contract payment requirements.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER

PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-60, FAR Case 2011-003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 76 FR 44884 on July 27, 2011, to make the necessary regulatory revisions to enable the use of the appropriate payment provisions for time-and-materials and labor-hour contracts. These revisions supplement the following previously issued revisions to the FAR addressing time-and-materials contracts:

(1) FAR Case 2003-027, Additional Commercial Contract Types (71 FR 74667 dated December 12, 2006), implemented section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Title XIV of the Act, referred to as the Services Acquisition Reform Act of 2003 (SARA), amended section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355, 41 U.S.C. 3307) to expressly authorize the use of time-and-materials and labor-hour contracts for commercial services under specified conditions.

(2) FAR Case 2004-015, Payments Under Time-and-Materials and Labor-Hour Contracts (71 FR 74656 dated December 12, 2006), revised and clarified policies related to the award and administration of noncommercial time-and-materials and labor-hour contracts and the policies regarding payments made under those contracts.

II. Discussion and Analysis of the Public Comments.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

The proposed rule sought to harmonize the provisions for invoicing and submission of the final invoice between FAR clauses 52.216-7, Allowable Cost and Payment, and 52.232-7, Payments under Time-and Materials and Labor-Hour Contracts, when a time-and-materials contract is being used. Currently, under a time-and-materials contract, FAR clause 52.232-7 provides for monthly invoicing and submission of the completion voucher no later than one year from the date of work completion. These provisions are in conflict with the corresponding provisions of FAR clause 52.216-7, which is invoked under a time-and-materials contract. FAR clause 52.216-7 provides for invoicing on a bi-weekly basis for large businesses, and more frequent invoicing for small businesses, and the submission of the completion voucher no later than 120 days after completion of work.

Consequently, the final rule amends the basic FAR clause 52.232-7 to reflect the provisions for invoicing and submission of the completion voucher at FAR clause 52.216-7.

This final rule deletes Alternate I along with its prescription for use at FAR 32.111(a)(7)(i).

Alternate I of FAR 52.232-7 provided for the addition of paragraph (j) in labor-hour contracts which deleted the terms of the basic clause governing the reimbursement of furnished materials. Alternate I, paragraph (j), is superfluous and is deleted since the terms of the basic clause governing the reimbursement of furnished materials are in effect self-deleting.

B. Analysis of public comments

Three respondents submitted comments in response to the proposed rule. A discussion of these comments and the changes made to the rule as a result of these comments are provided as follows:

1. Time-and-materials contracts and ceiling prices

Comment: A respondent recommended changing the way time-and-materials contracts are managed to align more closely with how the Canadian procurement regulations manage time-and-materials contracts. Specifically, U.S. Government regulations should include language requiring a ceiling price on time-and-materials contracts within which the contractor must complete the prescribed work.

Response: This comment is outside the scope of this case, which was limited to simply clarifying the existing prescriptions and clauses relating to appropriate payment

provisions for use in time-and-materials and labor-hour contracts. FAR 16.601 delineates that time and materials contracts must include a ceiling price that the contractor exceeds at its own risk.

2. Inclusion of FAR 52.246-6(f) provision

Comment: A respondent stated that the proposed rule should include consideration of the provision found at FAR 52.246-6(f), Inspection-Time-and-Material and Labor-Hour, paragraph (f) (requirement to replace or correct services or materials that failed to meet contract requirements).

Response: This comment is outside the scope of this case, which was limited to simply clarifying the existing prescriptions and clauses relating to appropriate payment provisions for use in time-and-materials and labor-hour contracts. Inclusion of FAR provision 52.246-6(f) language into the payment provisions at FAR 52.212-4, 52.216-7, or 52.232-7 is unnecessary.

3. Consistency between revised clauses

Comment: A respondent cited several instances where language was inconsistent between the clauses under the proposed rule. Specifically, the proposed rule aligned the frequency of invoicing and the period for submission of the completion voucher provisions for time-and-materials contracts at FAR 52.232-7 with that currently set forth in

the "Allowable Cost and Payment" clause at FAR 52.216-7. However, for labor-hour contracts, under Alternate I to 52.232-7, the proposed rule left the invoicing and period for submission of the completion voucher provisions, which were different from the requirements set forth in FAR 52.216-7 and 52.232-7, unchanged. The respondent questioned this inconsistency regarding these provisions.

Response: The invoicing and submission of the completion voucher provisions in time-and-materials contracts and labor-hour contracts should align. Consequently, the final rule does not include the proposed rule language regarding invoicing and the period for submission of completion vouchers for labor-hour contracts in Alternate I to FAR clause 52.232-7.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review

under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it merely clarifies the existing prescriptions and clauses relating to services contracts. No comments from small entities were submitted in response to the Regulatory Flexibility Act request under the proposed rule.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 16, 32, and 52

Government procurement.

Dated: July 16, 2012

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 16, 32, and 52 as follows:

1. The authority citation for 48 CFR parts 16, 32, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 16—TYPES OF CONTRACTS

2. Amend section 16.307 by revising paragraph (a)(1); and adding paragraphs (a)(3) through (5) to read as follows:

16.307 Contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.216-7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a commercial item) is contemplated. If the contract is a time-and-materials contract, the clause at 52.216-7 applies in conjunction with the clause at 52.232-7, but only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232-7) at actual cost. Further, the clause at 52.216-7 does not apply to labor-hour contracts.

* * * * *

(3) If the contract is with an educational institution, the contracting officer shall use the clause at 52.216-7 with its Alternate II.

(4) If the contract is with a State or local government, the contracting officer shall use the clause at 52.216-7 with its Alternate III.

(5) If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under OMB Circular No. A-122, the contracting officer shall use the clause at 52.216-7 with its Alternate IV.

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PART 32—CONTRACT FINANCING

3. Amend section 32.111 by revising paragraph (a) (7) to read as follows:

32.111 Contract clauses for non-commercial purchases.

(a) * * *

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated. If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a) (7) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of \$50,000 under the contract. The contracting officer shall ensure that the modification specifies the percentage and total amount of

the withheld payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (g) of the clause.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend Alternate I of section 52.212-4 by—

a. Revising the date of Alternate I and the introductory text;

b. Revising paragraphs of (i) (1) introductory text and (i) (1) (ii) (A); and

c. Adding paragraph (m).

The revised and added text reads as follows:

52.212-4 Contract Terms and Conditions—Commercial Items.

* * * * *

Alternate I ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]). When a time-and-materials or labor-hour contract is contemplated, substitute the following paragraphs (a), (e), (i), (l), and (m) for those in the basic clause.

* * * * *

(i) Payments. (1) Work performed. The Government will pay the Contractor as follows upon the submission of commercial invoices approved by the Contracting Officer:

* * * * *

(ii) * * *

(A) If the Contractor furnishes materials that meet the definition of a commercial item at 2.101, the price to be paid for such materials shall not exceed the Contractor's established catalog or market price, adjusted to reflect the—

* * * * *

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon written request, with adequate assurances of future performance. Subject to the terms of this contract, the Contractor shall be paid an amount computed under paragraph (i) Payments of this clause, but the "hourly rate" for labor hours expended in furnishing work not delivered to or accepted by the Government shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified in paragraph (a)(4) of this clause, the portion of the "hourly rate" attributable to profit shall be 10 percent. In the event of termination for cause, the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

5. Amend section 52.216-7 by adding Alternates II through Alternates IV to read as follows:

52.216-7 Allowable Cost and Payment.

* * * * *

Alternate II ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]). As prescribed in 16.307(a)(3), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.3 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may

require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate III ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]). As prescribed in 16.307(a)(4), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.6 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate IV ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]). As prescribed in 16.307(a)(5), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(a)(1) The Government will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with FAR subpart 31.7 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

6. Amend section 52.232-7 by—

- a. Revising the date of the clause;
- b. Revising the introductory text of paragraph

(a)(5);

c. Removing from the last sentence of paragraph (f) "1 year" and adding "120 days" in its place; and

- d. Removing "Alternate I".

The revised text reads as follows:

52.232-7 Payments under Time-and-Materials and Labor-Hour
Contracts.

* * * * *

PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS ([INSERT
ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER])

* * * * *

(a) * * *

(5) Vouchers may be submitted not more than once every two weeks, to the Contracting Officer or authorized representative. A small business concern may receive more frequent payments than every two weeks. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by—

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[BILLING CODE 6820-EP]

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